

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDY LYNN LYTLE)	
Claimant)	
)	
VS.)	
)	
J & J/BMAR JOINT VENTURES, LLP)	
Respondent)	Docket No. 1,029,543
)	
AND)	
)	
COMMERCE & INDUSTRY INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the August 31, 2009 Post-Award Medical Award by Administrative Law Judge Rebecca A. Sanders. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Jeffery K. Cooper of Topeka, Kansas, appeared for the claimant. John B. Rathmel of Merriam, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the post-award record and adopted the stipulations listed in the Award.

ISSUES

This is a post-award proceeding for medical treatment. Claimant requested treatment for her left shoulder and a hot whirlpool tub which had been prescribed by the authorized treating physician.

The Administrative Law Judge (ALJ) found claimant's left shoulder injury was a natural and probable consequence of the original injury. The ALJ further found that the prescribed hot whirlpool tub was reasonable treatment to cure and relieve claimant from the effects of her injury.

Respondent requests review of the following: (1) whether claimant's left shoulder complaints arose out of and in the course of employment with respondent; (2) whether a hot tub is necessary to cure and relieve claimant's injury; (3) whether the hot tub issue was a proper topic for post-award medical hearing having been raised before final award, or whether its redetermination is barred by *res judicata*; and, (4) whether the ALJ has jurisdiction to rule on issues not raised at the post-award medical hearing.

Claimant argues the ALJ's Post-Award Medical Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury on July 8, 2004, when she twisted her right ankle while at work. After her accident, respondent provided treatment with Dr. William Jones, an orthopaedic surgeon, during the course of that treatment, claimant's symptoms did not improve. Dr. Jones referred claimant to Dr. Steven Peloquin, a pain management physician, for further evaluation of her growing complaints. Dr. Peloquin examined her, identified some vasomotor instability, allodynia and a number of other symptoms which led him to diagnose her with complex regional pain syndrome (CRPS)¹.

At the time of the underlying award, claimant's treatment included pain medications, a dorsal column stimulator as well as injections in the facet joints in her spine. Dr. Peloquin had also prescribed a walker to aid claimant's walking and lessen the weight on her right ankle along with a whirlpool to provide a means of relaxing claimant's muscles.

On May 14, 2008, the ALJ found that claimant sustained a 19 percent permanent partial scheduled disability. Claimant filed for review by the Workers Compensation Board. On September 30, 2008, the Board modified the ALJ's Award awarding claimant a 46 percent work disability and also appointed Dr. Peloquin as claimant's authorized treating physician until released from his care or until further order of the Court.

On December 10, 2008, an application for post-award medical was filed on claimant's behalf requesting a memory foam mechanical bed as recommended by Dr. Peloquin. Then on April 22, 2009, another application for post-award medical was filed. Claimant requested a hot whirlpool tub as recommended by Dr. Peloquin. A third application was filed on June 16, 2009, requesting medical treatment as recommended by Dr. Peloquin.

¹ Peloquin Depo. at 6-7. This condition is sometimes referred to as reflex sympathy dystrophy (RSD).

At the post-award medical hearing held on June 22, 2009, claimant testified that in April 2009 she had a surgical procedure for a peripheral implant. Claimant was taken off work and was bed ridden for a period of time. Claimant testified she felt that the repositioning and moving in bed following her surgery is what caused her left shoulder to hurt. Because of the implant and wires from the surgery claimant had to use her arms more to reposition herself in bed.

Dr. Peloquin's medical record of claimant's office visit on April 30, 2009, noted her complaint of left shoulder pain which she had experienced intermittently from using crutches. But claimant noted that pain was aggravated as she strained to get up after her surgery. In the record of the office visit of May 14, 2009, the doctor opined that the left shoulder condition was related to claimant's original injury and was aggravated while she strained to get out of bed.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*², the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

Claimant's shoulder injury occurred as a direct and natural consequence of the original accident. It was not the result of an activity of day-to-day living as argued by respondent. Although getting up from bed and rolling over in bed may be normal activities of day to day living, in this instance claimant's left shoulder injury was due to the awkward manner she had to accomplish those tasks by just using her arms because of her surgery. And the surgery was necessitated by her work-related injury.³

Claimant's testimony established that she hurt her shoulder because she had to use her arms more to move her body when repositioning herself in bed while recuperating from a surgery necessitated by the work-related injury. Dr. Peloquin's uncontradicted medical testimony confirmed that claimant aggravated her shoulder straining to get up after her surgery. Moreover, Dr. Peloquin further opined the shoulder pain was related to the original injury. The Board affirms the ALJ's determination that the left shoulder condition is a natural and probable consequence of the claimant's work-related injury.

² *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

³ The test under K.S.A. 44-508(e) is not whether the accident resulted from a normal activity of day to day living but rather whether the "employee suffers disability as a result of the natural aging process or by the normal activities of day to day living." See e.g., *Gibson v. Honeywell Aerospace Electronic Systems*, No. 1,033,149, 2007 WL 3348543 (Kan. WACB Oct. 25, 2007).

Respondent next argues that claimant's request for a whirlpool hot tub should be denied as that issue was determined by the underlying Award and Board Order on Review. The Board disagrees.

Any time after the entry of an award, an injured worker may apply for additional medical benefits. The standard or test the judge is to apply is whether the requested treatment is necessary to cure or relieve the effects of the worker's work-related accident. The Act provides:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care *if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury* which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.⁴ (Emphasis added.)

The statute does not require a change of condition. The purpose of a post-award medical proceeding is to address whether claimant needs additional medical treatment as a result of the injury suffered in the underlying award. A medical condition that was stable can change and require additional treatment. Likewise, a treatment modality not pursued can become appropriate with the passage of time and further change in the claimant's condition. Again, that is exactly the reason for a post-award medical proceeding. The claimant must simply prove that the medical treatment sought is causally related to the injury suffered in the underlying award. *Res Judicata* does not apply in this instance.

In this instance, during the litigation of the underlying award, Dr. Peloquin had prescribed a hot whirlpool tub. But he testified that did not necessarily mean a hot tub and he noted there are whirlpool devices that can be put in a bathtub. The claimant testified that she tried a whirlpool device in her bathtub but it did not alleviate her pain. By that time the original prescription for a hot tub had expired so she went to Dr. Peloquin who again prescribed a hot whirlpool tub but he specifically noted it should allow claimant to sit more ergonomically than in her bathtub and additionally have the water cover her back as well as her legs. And he further prescribed that she use the hot tub 20 to 30 minutes twice a day. The doctor did not want claimant to use a public hot tub because of fear of fungal

⁴ K.S.A. 44-510k(a).

infection and it was further noted there was not a public facility close to claimant for her to use a hot tub twice a day.

Claimant suffers from CRPS and Dr. Peloquin noted that claimant would obtain relief from her ongoing pain and muscle spasms by using a hot tub twice a day. Based upon the medical evidence proffered at the post-award medical hearing, the Board affirms the ALJ's determination that respondent provide claimant a hot whirlpool tub which is a reasonable treatment to cure and relieve claimant from the effects of her injury.

Finally, respondent argues that the ALJ erred in determining that claimant's attorney fees in connection with this post-award proceeding would be determined after submission of claimant's attorney's itemization of time and expenses.

Under K.S.A. 44-536(g), the ALJ can assess attorney fees against an employer and its insurance carrier for the legal services rendered an injured worker to obtain additional medical treatment following a final award. K.S.A. 44-510k(c) specifically provides an ALJ may award attorney fees for services rendered seeking post-award medical benefits. And K.S.A. 44-536(h) further provides that all disputes regarding attorney fees shall be heard and determined by the ALJ. Consequently, the ALJ did not err.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated August 31, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffery K. Cooper, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge